IN THE

Supreme Court of the United States

October Term, 1924.

No. 287.

THE WESTERN PACIFIC RAILROAD COMPANY,
Appellant,

vs.

THE UNITED STATES.

REPLY BRIEF FOR APPELLANT.

I.

The Court of Claims in a former action brought by the present appellant, gave judgment for this appellant on claims which it had received in exactly the same manner that appellant received the claims now in suit.

All except a few of the latest items of the claims in that case were based on transportation services rendered either by the Western Pacific Railway Company (predecessor of appellant), or the receivers of the property of that railroad, prior to the acquisition of its assets by the appellant, and the suit was brought after such acquisition by appellant. The Court of Claims, evidently considering this acquisition of title valid and unobjectionable, gave judgment for a sub-

stantial portion of the claims (based on the transportation services rendered from March 18, 1915, to August 1, 1916), and dismissed the petition as to the rest of the claims sued on upon grounds not affecting the matter of acquisition or assignment. From the action of the Court of Claims in dismissing the petition as to said portions of its claims, the plaintiff appealed to this Court where the judgment of the Court of Claims was affirmed.

The case referred to is *Western Pacific Railroad Company vs. United States*, 255 U. S. 349, 65 L. ed. 671. The third finding of fact in that case which may be found at page 9 of the printed Transcript of Record therein (on file in the Clerk's office of this Court) reads:

III.

"Pursuant to a decree of the District Court of the United States for the Northern District of California, entered on May 27, 1916, in a certain cause there pending, entitled Equity No. 169, The Equitable Trust Company of New York, as trustee, complainant, against the said Western Pacific Railway Company and others, and pursuant to a master's sale as therein directed and afterwards approved by the court, the petitioner, by deed of Francis Krull, special master, and others, dated July 1, 1916, acquired all of the railways, property, assets, and choses in action belonging to the said Western Pacific Railway Company or to Frank G. Drum and Warren Olney, Jr., as receivers of the said Western Pacific Railway Company appointed in said cause, and in a certain cause ancillary thereto pending in the District Court of the United States for the District of Utah, who, as such receivers, operated the railway properties of said Western Pacific Railway Com-

pany during the period from March 3, 1915, in the one case, and March 6, 1915, in the other, until July 14, 1916, when the said receivers turned over to the petitioners the railways, property, and assets of said Western Pacific Railway Company, since which time the petitioner has operated said railways; and hereinafter in the paragraphs relating to transportation and settlements therefor the term 'claimant' is, for convenience, used to designate the said Western Pacific Railway Company, the said receivers, or the petitioner herein, as the case may be."

A comparison of the above-quoted finding of fact with the third finding of fact in the instant case (R. 53), will show that title to the claims now in suit was derived in precisely the same manner as was the title to the claims on which recovery was allowed in the case referred to.

The lower Court in the instant case in the opening sentence of the opinion states a clear assumption when it refers to "mortgage foreclosure proceedings." (R. 57.) There is nothing in the findings of fact to support this statement. In order to declare that a prohibited assignment was made, the facts showing such action should be clearly established. Claimant's title was shown in the petition herein. (R. 1-2.) This title necessarily was also set f rth in the stipulation of facts entered into by counsel for the Government upon which the findings of fact of the lower Court were predicated (R. 53) and is stated in the findings of fact in almost identical language with that used in the said former case in which recovery was allowed.

No question as to the validity of the plaintiff's title to any of the claims sued on was raised by counsel for the Government in the lower court in the instant case.

II.

The claim in the above cited case was for the difference between the amount of numerous freight charges on furniture and effects of officers transported in excess of their "change of station allowance" calculated at full tariff rates and the amounts received by the plaintiff and its predecessors, payment having been made in each case with land-grant deductions. That portion of the claims disallowed covered all payments which had been accepted without protest and the portion of the claims for which judgment was given covered all items as to which protests had been made at the time payments were accepted. 255 U. S., page 355.

That as to a part of the items of the claim for which judgment was given, the payments accepted under protest were made by disbursing officers and that the protest as to each of said items was endorsed on the voucher executed by the plaintiff or the receivers for its predecessor appears from the Fourteenth Finding of Fact (page 15 of the Printed Transcript of Record), which states that as to certain of said items (included in said recovery) "*Voucher showing land-grant deductions was submitted with the endorsement 'stated at net cash rate under protest.'*" (Italics ours.)

Respectfully submitted,

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